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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-4158

GERALD GALINIS, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

GREENBERG, *Judge*: The appellant, Gerald Galinis, appeals through counsel that part of a November 15, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for right-ear hearing loss and tinnitus.[1] Record (R.) at 2-16. The appellant argues that the Board (1) improperly discredited his assertions; (2) failed to properly consider whether entitlement to service connection was warranted for right-ear hearing loss and tinnitus under a theory of continuity of symptomatology; and (3) relied on an inadequate medical examination. Appellant's Brief at 6-19. For the following reason, the Court will vacate that part of the November 2016 Board decision on appeal and remand the matter for readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations such as their widows, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real

[1] The Board also denied service connection for left-ear hearing loss. The appellant presents no argument as to this matter, and the Court deems it abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

From the beginning of the Republic statutory construction concerning congressional promises to veterans has been of great concern. "By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?" *Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60, 69 (1803).

The appellant is a Vietnam War veteran with active duty service in the U.S. Army from September 1963 to September 1968 as a light vehicle driver. R. at 25 (DD Form 214). The appellant was awarded the Vietnam Campaign and Service Medals as well as a sharpshooter badge. R. at 25. The appellant has alleged that as a driver in Vietnam, he would transport artillery rounds to the soldiers. R. at 113. The appellant has also claimed that the soldiers actively fired these rounds while he made his deliveries causing him hearing loss and tinnitus in service. R. at 113-14, 575.

In June 2011, the appellant filed for benefits based on service connection for hearing loss and tinnitus. R. at 336.

In November 2016, the Board issued its decision denying service connection for right-ear hearing loss and tinnitus. R. at 2-16. The Board accepted the appellant's assertion that he was exposed to significant noise from small arms fire during service but found the appellant's reports of diminished hearing in service were inconsistent with the September 1968 medical history report completed during his separation from service. R. at 9-11. This appeal ensued.

Pursuant to 38 U.S.C. § 1154, in the case of a veteran who engaged in combat, the Secretary shall accept as sufficient proof of an in-service occurrence or aggravation of an injury

> satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary.

38 U.S.C. § 1154(b).

The Court concludes the Board erred in failing to determine whether the appellant was a combat veteran and therefore entitled to statutory protections afforded to lay testimony under 38 U.S.C. § 1154(b). *See* 38 U.S.C. § 1154(b). The Board appears to have accepted the appellant's contention that he experienced "exposure to loud noise while serving as a driver while military personal shot artillery from the truck that he drove," yet failed to address whether this was combat. R. at 7, 9. The appellant has testified that both his hearing loss and tinnitus began in service and thus this determination is necessary to properly adjudicate the appellant's claims. S*ee Reeves v. Shinseki*, 682 F.3d 988, 998-99 (Fed. Cir. 2012) (statutory presumption applies to not just the veteran's testimony of noise exposure, but also to his testimony that his hearing loss began in service). Remand is required for the Board to determine whether the appellant is a combat veteran and thus entitled to the application of § 1154(b). If the appellant is determined to be a combat veteran, the Board should be mindful that none of the medical examinations have considered the appellant's lay testimony in light of the statutory protections afforded to these worthy individuals. *See* 38 U.S.C. § 5103

Because the Court is remanding the appellant's claim, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

For the forgoing reasons, the November 15, 2016, Board decision on appeal is VACATED and the matters are REMANDED for readjudication.

DATED: February 28, 2018

Copies to:

Zachary M. Stolz, Esq.

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